

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of
Appeal of Due Process Level I Decision
by

--- ----,

Petitioner/Appellant,

-v-

WINSLOW UNIFIED SCHOOL DISTRICT,
Respondent.

Docket No. 02F-II0006-ADE

DECISION AND ORDER OF
ADMINISTRATIVE LAW JUDGE IN
LEVEL II APPEAL

This matter came on for final Level II administrative review based on the July 30, 2001 Appeal, filed by Petitioner --- ---- (Petitioner/ Appellant), regarding the June 25, 2001 Due Process Hearing Officer's decision. Petitioner's appeal stated no specific issues, but requested administrative review of the dismissal with prejudice and the assessment of costs and expenses against Petitioner's counsel. Petitioner's Supplementary appeal asserted that the Due Process Hearing Officer's Order was without authority and was arbitrary and capricious.

Pursuant to Arizona Revised Statutes (A.R.S.) §41-1092.01 et seq., the Arizona Department of Education (ADOE) referred this matter, and the Level I record, to the Office of Administrative Hearings for the final Level II administrative appeal review as provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). ADOE completed its filing of the remaining Level I documents in this matter on September 10, 2001.

The law governing due process proceedings is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. (as re-authorized and amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona Special Education statutes, A.R.S. §§15-761 et seq., and the implementing rules, A.A.C. R7-2-401 through R7-2-408.

Both federal and state law require that the Level II reviewer "make an independent decision". 20 U.S.C. §1415(g) (1998 Supp.); A.A.C. R7-2-405(21)(b)(v.). The Level II reviewer may exercise non-deferential review, except that deference will be given to findings of a hearing officer based on credibility judgments. *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995). Therefore, this tribunal is not bound by a hearing officer's factual or legal conclusions.

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1 This tribunal's ORDER of September 12, 2001, set the Conclusion of the record
2 and matter to be October 31, 2001, with the final Level II decision to be issued no later
3 than November 31(sic), 2001. The Level II review was conducted through a written
4 briefing submission process, during which Respondent Winslow Unified School District
5 (WUSD) filed a brief: Motion for Summary Judgment. Petitioner made no final Reply.
6 Therefore, the matter was considered Concluded as of October 31, 2001, and this
7 Decision and Order is issued no later than November 30, 2001.

8 Having reviewed and considered the record of the Level I Due Process hearing,
9 Petitioner's Appeal and Supplementary appeal, and Respondent's Motion for Summary
10 Judgment, the following Findings, Decision and Order are made in this Level II review.

11 FINDINGS

12 1. No documentation was provided to this Tribunal for any determination of
13 timeliness of Petitioner's appeal and, therefore, it is presumed that the Petitioner's July
14 30, 2001 filing was timely as to invoking a Level II review in this matter.

15 2. According to the record, Petitioner had requested a due process hearing in
16 October of 2000. The due process hearing was requested regarding an evaluation for
17 disability under IDEA and Section 504, and the allegation that "the school knew or
18 should have known that [Student] had and has an emotional disability qualifying under
19 both the I.D.E.A. and section 504 for special services and protection from this improper
20 expulsion." See Undated Letter from Petitioner's counsel to Dale Patton, Attorney for
21 Respondent school district.

22 3. According to the record, after the appointment of the Due Process Hearing
23 Officer, between October of 2000 and March 2001, the Due Process Hearing Officer
24 granted Petitioner four extensions of time to pursue an independent psycho-educational
25 evaluation. See Order dated December 4, 2000; Order dated January 22, 2001; Order
26 dated March 5, 2001; and, Order dated April 18, 2001.

27 4. According to the record, thereafter, by letter dated April 23, 2001, the Due
28 Process Hearing Officer notified Petitioner's counsel that there would be one final
29 extension of time for concluding the due process matter. In that letter, Petitioner was
30

1 directed, by June 4, 2001, to either: withdraw the due process request; respond to the
2 school district's Motion to Dismiss; or, appear at a scheduled hearing (to be set).

3 5. According to the record, by Order dated June 6, 2001, the Due Process
4 Hearing Officer granted the filing of briefs to dispose of the matter. On June 6, 2001,
5 Respondent filed its Motion to Dismiss the Special Education Due Process Hearing.

6 7. According to the record, by Order dated June 7, 2001, Petitioner was given
7 until June 22, 2001 to file a Response, with Respondent given until June 29, 2001 to
8 then file a Reply. The Order of the Due Process Hearing Officer stated "In the absence
9 of a Response by Petitioner. this Motion will be considered to be submitted on the
10 record and a disposition of the Motion will be made in that basis."

11 8. On June 25, 2001, the Due Process Hearing Officer issued the Order of
12 Dismissal "with prejudice." and further ordered that "all costs and expenses borne by the
13 Respondent school district shall be paid by Petitioner's counsel." The Order of
14 Dismissal states that "No response to the Motion to Dismiss was filed."

15 9. The record does not contain any timely Response filed by Petitioner, but does
16 contain a Response to Motion dated June 28, 2001. Based on the documentation
17 available in this Level II hearing record, the Response was fax-filed to the Due Process
18 Hearing Officer on June 29, 2001.

19 10. According to the record, Respondent filed its July 6, 2002 demand letter for
20 payment of the Respondent's costs and expenses [\$1,518.00] and the fees of the Due
21 Process Hearing Officer [\$1,520.00].

22 11. According to the record, Petitioner's appeal followed on July 30, 2001.
23 Petitioner also filed a Supplementary Appeal dated August 2, 2001, which was received
24 by ADOE on August 6, 2001. Neither Petitioner's appeal nor the Supplementary appeal
25 was copied to the Respondent.

26 12. According to the Level II record, by Letter dated August 7, 2001, Respondent
27 memorialized a July 24, 2001 conversation with Petitioner's counsel regarding the
28 Respondent's costs and fees. The Respondent's letter further states that the
29 Respondent would not take any further action to recover attorney's fees and costs
30 incurred in the connection with the special education hearing, and notified Petitioner that

1 they may disregard the Respondent's July 6, 2001 [demand] letter. See Respondent's
2 Attachment to its October 2, 2001 Motion for Summary Judgment.

3 **PETITIONER ARGUMENTS**

4 **Petitioner appeals the Due Process Hearing Officer's determination to dismiss the**
5 **matter with prejudice and ordering Petitioner's counsel to pay Respondent's**
6 **costs and expenses.**

7 Petitioner alleges that the Due Process Hearing Officer erred and had no
8 authority to dismiss the matter with prejudice and indicate that Petitioner's counsel shall
9 pay "all costs and expenses borne by the Respondent school district."

10 Petitioner's counsel states that she received a demand for payment of the
11 Respondent's costs and expenses [\$1,518.00] and the fees of the Due Process Hearing
12 Officer [\$1,520.00]. Petitioner's counsel argues that the Due Process Hearing Officer
13 had not issued any "supplementary orders" incorporating these payment demands.

14 Petitioner's counsel argues that she was not certain if a thirty-five day appeal
15 period had begun without the issuance of an Order. Petitioner's counsel argued that the
16 Due Process Hearing Officer was without authority to issue such orders and that such
17 orders "far exceeded the letter, spirit and public policy of the IDEA". Petitioner's counsel
18 argued that the Due Process Hearing Officer had not cited any authority for assessment
19 of costs and expenses and had made no Findings or Conclusions with regard to
20 authority or rational for such assessment of costs and expenses. Petitioner's counsel
21 argued that such orders, even if permitted, have a chilling effect upon students seeking
22 their due process rights and obtaining counsel to protect their interests. Petitioner's
23 counsel argues that the matter simply should have been set for hearing or dismissed
24 without prejudice "as we subsequently asked them to be." Petitioner's counsel argues
25 that the Due Process Hearing Officer had ex-parte contact with the Respondent and
26 suggested that she file the Motion [to Dismiss] and for that reason, argues that the
27 unspecified "orders" should be set aside.

28 **RESPONDENT ARGUMENTS**

1 **Respondent WUSD argues the issue of payment of costs and expenses is moot,**
2 **and that the Due Process Hearing Officer had authority to dismiss the matter with**
3 **prejudice.**

4 Respondent argues that the costs and expenses issue is moot, and need not be
5 addressed on appeal, given the Respondent's notification on August 7, 2001, to
6 Petitioner of its intent to not enforce the Due Process Hearing Officer's Order of
7 Dismissal relative to costs and expenses.

8 Respondent further argues that failures to provide information and failures to
9 abide by Orders or direction of a due process hearing officer have resulted in dismissals
10 of special education matters, citing *School District of Sevastopol*, 24 IDELR 482 (SEA
11 WI 1996) and *Epsom School District*, 31 IDELR 120 (SEA NH 1999) and *Daniels v. San*
12 *Francisco Unified School District*, 34 IDELR 143 (N.D. Cal. 2001). Additionally,
13 Respondent argues that dismissal with prejudice was appropriate, as demonstrated by
14 the matter of *Okemos Public Schools*, 29 IDELR 677 (SEA MI 1998), where the student
15 failed to prosecute after being sent a letter of warning of possible dismissal for lack of
16 prosecution, and the court determined that the school and its employees had incurred
17 considerable expense and wasted time due to the student's failure to prosecute.

18 Further, Respondent argues that the conduct of a due process hearing is within
19 the discretion of the due process hearing officer, citing *Madison (WI) Metropolitan*
20 *School District*, 20 IDELR 283 (OCR 1993) and *Moye by Moye v. Special School District*
21 *No. 6, South St. Paul , Minnesota*, 23 IDELR 229 (D. Minn. 1995).
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DECISION

1. The issue of payment of costs and expenses is moot, given the Respondent's clear notification of August 7, 2001 to Petitioner that Respondent would not seek to recover the costs and expenses from the special education due process matter.

2. The IDEA provides broad authority and discretion in the handling of special education due process matters. Clearly, many cases over the years and across the country uphold the due process hearing officers' directed or ordered due process hearing process and the dismissals following students' failures to proceed.

3. In this matter, the Due Process Hearing Officer's Order of Dismissal was an appropriate exercise of his authority and discretion in the due process hearing process.

ORDER

Based on the foregoing,

The Due Process Hearing Officer's June 25, 2001 Order of Dismissal is Affirmed, Respondent WUSD's Motion for Summary Judgment is Granted, and Petitioner ----'s appeal is Denied.

This Decision and Order of the Administrative Law Judge is the final Level II administrative appeal in the matter, and any party aggrieved by this Decision and Order of the Administrative Law Judge has a right to, and may seek, judicial review. Arizona Administrative Code R7-2-405.22.

ORDERED and DATED this 30th day of November, 2001.

Kay A. Abramsohn
Administrative Law Judge

Copy sent by Certified mail _____
this ____ day of November 30, 2001, to:

--- ----
c/o Mr. & Mrs. --- ----

Winslow, AZ
Petitioner

Winslow Unified School District #1
ATTN: Betty Walch, Special Education Director
214 E Elm Street
P.O. Box 580
Winslow, AZ 86047
Respondent

Copy mailed
this ____ day of November 30, 2001, to:

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Steven Mishlove, Associate State Director
Arizona Department of Education
ATTN: Theresa Schambach
1535 West Jefferson
Phoenix, AZ 85007

By _____